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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 649

EARL ARTIS, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. 29) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 30, 1956 (Pet. 29) and a petition for rehearing was denied on November 26, 1956 (Pet. 39). The petition for a writ of certiorari was filed on De-

cember 22, 1956. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether, in affirming a conviction for income tax evasion based on the net worth method of proof, the Court of Appeals was required to write an opinion.

2. Whether petitioner's motion for acquittal should have been granted on the ground that the Government had failed to investigate possible sources of non-taxable funds.

3. Whether the petitioner's capital investment in a partnership was properly treated in the Government's reconstruction of his income by the net worth method.

4. Whether the trial court committed prejudicial errors of commission or omission in instructing the jury.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000,

or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

On April 12, 1955, petitioner was indicted in the United States District Court for the Southern District of Ohio on three counts of wilful attempted evasion of individual income taxes for the years 1948 through 1950, in violation of Section 145(b) of the Internal Revenue Code of 1939. (R. 4a-6a.)[1] After a jury trial, petitioner was found not guilty on Count 1 (relating to 1948) and guilty on Counts 2 and 3 (relating to 1949 and 1950). (R. 404a.) On February 2, 1956, petitioner was sentenced to concurrent five-year prison terms on each count and fined $5,000 on each count, a total fine of $10,000. (R. 3a.)

The indictment alleged that the amounts of net income and income tax declared by petitioner and his wife (joint returns having been filed for each year) compared with the true amounts as follows (R. 4a-6a):

Indictment Year	Net Income		Income Tax	
	Reported	Corrected	Reported	Corrected
1948	$ 62,263.34	$ 99,205.79	$22,961.22	$ 44,759.18
1949	54,028.93	98,128.38	18,046.70	43,696.38
1950	47,745.50	59,864.07	14,987.98	21,582.06
Totals	$164,037.77	$257,198.24	$55,995.90	$110,037.62

The evidence to support the verdict may be summarized briefly as follows:

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[1] The printed record consists of petitioner's appendix in the Court below (numbered from 1a to 424a) and the Government's appendix in the court below (numbered 1B to 46B).

At the beginning of 1948, petitioner operated a numbers (policy) business of his own. In March, 1948, he entered a partnership with another individual and through the balance of the prosecution years they operated the numbers business as a partnership. Throughout 1949 and 1950 each partner had a 50% interest. (R. 32a, 6B-15B.)[2] For those years, petitioner reported income from rentals, dividends, interest, and capital transactions, but by far the major item was his income from the partnership. (R. 34B-42B.)

When the Treasury agents' investigation began in 1951, the only records of the partnership produced for their examination consisted of daily sheets summarizing the gross receipts, expenses, "hits" purportedly paid to successful bettors, and the profit or loss for the day. (R. 24a-26a, 43B.) The agents were never supplied with any records showing the partnership bankroll or other partnership assets. (R. 31a.) The daily sheets proved to be unreliable in that they often overstated the amount of "hits" paid out, thus understating net income. (R. 122a, 130a, 135a-136a, 140a-141a, 148a.) Finding it impossible to determine petitioner's true income from the partnership records (R. 29a-30a), the agents conducted a thorough investigation of the net worth of petitioner and his wife as of the various pertinent dates (R. 35a, 46a-69a, 184a-188a). The net worth increases, after proper adjustments for non-deductible expenditures and losses, established unreported income for each of the three years in substantially the amounts alleged in the indictment. (R. 417a-419a.)

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[2] The details of the operations of this business are described at pages 6-7 of the petition.

The net worth of petitioner and his wife at the starting point (December 31, 1947), as determined by the Government, was in substantial agreement with that claimed in a detailed statement submitted to the agents by petitioner in 1951. (R. 415a-419a.) This document, which was prepared by petitioner's attorney and accountant and signed by petitioner, claimed $15,000 of cash on hand at the starting point and showed that it gradually diminished to $3,000 at the end of 1950. (R. 25a-26a, 92a, 415a.) The amounts of cash on hand thus claimed were used in the Government's net worth reconstruction. (R. 4a.) On two occasions early in 1948, petitioner sustained large daily net losses on "hits" and within two to three days thereafter borrowed money from bank. (R. 362a.) At another time in 1948, petitioner suffered a series of losses to one individual and was obliged to pay him off in instalments. (R. 363a.) Petitioner's total bank borrowings during the three weeks before and after January 1, 1948, were $15,500. (R. 205a.)

When the Government's reconstruction of petitioner's net worth was first shown to him, petitioner stated that it looked all right to him. (R. 33a, 39a, 269a, 417a-419a.) Later, however (in August, 1954), petitioner advised the agents that the net worth statement he had submitted three years earlier was incorrect in that he had included any of the cash on hand used in the conduct of the numbers business. (R. 180a.) He contended that he had borrowed money from the bank only for the purpose of establishing credit. (R. 181a.) The agents asked whether he had any information or evidence to substantiate the cash figures used in his signed statement, and petitioner replied that he had nothing at that time and that he did not want to give

his whole defense to the agents at that conference. Neither then nor later did petitioner furnish any further information on the subject, or fix the amount of the alleged additional cash on hand. (R. 183a, 310a.)

Petitioner admitted to the agents that he had never received any gifts or inheritances in excess of a stated nominal amount. (R. 306a.)

The defense offered no witnesses at the trial.

ARGUMENT

1. Petitioner's first contention (Pet. 13-14, 27-28) is so lacking in merit that it requires no extended discussion. There is no general rule of law that requires a federal appellate court to write an opinion in every case, no matter how insubstantial the points involved. Cf. *International Broadcasting Corp.* v. *Federal Communications Commission,* No. 351, this Term, in which certiorari was denied, 352 U. S. 895. The court below may well have considered that this was so clear a case that no discussion was needed beyond the express findings that "there was ample substantial evidence to support the verdict of the jury"; that "the district judge correctly charged the applicable law"; and that "he committed no reversible error in the admission or exclusion of evidence, or in the conduct of the trial." (Pet. 29.)

2. Petitioner urges (Pet. 14-17) that the Government's case must fail because it does not account for three possible sources of non-taxable funds which might account for the net worth increases: (a) drawings from petitioner's partnership; (b) alleged receipts from the sale of birds by petitioner's wife; and (c) cash on hand disclosed in revenue agents' reports. The argument is without merit.

(a) Since the Government's reconstruction of unreported income gave petitioner full credit for his distributive share of partnership net profits in each year (R. 419a, 17B, 35B, 39B), and since the venture was not formed until March, 1948 (*supra,* p. 4), it is apparent that petitioner's argument is no more than a disguised attack on the adequacy of the evidence to fix his net worth at the starting point. This is so because any substantial withdrawal of non-taxable funds (i.e., return of capital) could come only from the opening bank-roll. While the firm did not produce, and apparently did not maintain, any records of assets and liabilities (R. 31a), and failed to fill out the balance sheet schedules on the partnership returns (R. 5B, 10B, 15B)—thus rendering it impossible for the Government to fix the precise amount of petitioner's drawings—the evidence showed that the partnership assets other than bankroll were not a source of cash for the partners.[3] The likelihood that any of the alleged unreported income derived from a reduction in petitioner's bankroll investment was foreclosed by the Government's starting point proof. It was shown that by petitioner's own admission, made in writing in 1951, and submitted to the agents in the presence of his attorney, his cash on hand was fixed at $15,000 as of the end of 1947 and at lower amounts thereafter. (*Supra,* p. 5.) This admission was amply corroborated by the proof that he had made extensive bank borrowings early in 1948 and had been obliged to pay off at least one winner in instalments; that he main-

[3] The evidence showed, indeed, that some of the profits were being reinvested in the form of office and automotive equipment. It will be noted that the depreciation claimed on the partnership returns increased from $1,953.13 in 1948 to $3,758.30 in 1950. (R. 2B, 12B.)

tained a stock brokerage account in a fictitious name; that he overstated his capital losses on his returns; that the amounts paid out to successful bettors on "hits" was frequently overstated on the books; that petitioner sometimes entered the "hits" in the book; and that petitioner and his partner had instructed their runners and "pick-up men" not to keep any records. (*Supra*, pp. 4-5, R. 159a-160a, 174a, 341a-342a, 419a, 36B, 40B.) In brief, petitioner's cash-on-hand admission was corroborated by his conduct during the prosecution years and the fact that his "visible assets greatly increased at a time when he was receiving unrecorded amounts of taxable income." *United States* v. *Calderon*, 348 U.S. 160, 165; *Smith* v. *United States*, 348 U.S. 147, 157-159. Petitioner's belated contention (made three years after his admission) that he had had substantial additional cash on hand (*supra*, p. 5) presented only conflicting evidence which the jury was free to reject.

(b) Equally without substance is the suggestion (Pet. 10, 15) that a source of funds not taken into account was the possible receipt of money by petitioner's wife from the sale of birds. All of the returns in question were joint returns of petitioner and his wife. (R. 16B, 34B, 38B). The Government's reconstruction of income included all of the assets, liabilities and non-deductible expenditures of petitioner and his wife. (R. 417a-423a.) If she had, in fact, received such funds as petitioner suggests, they would obviously constitute taxable income which should have been reported on the returns.[4]

[4] The indictment charged petitioner with attempting to evade the taxes of himself and his wife by filing false and fraudulent returns understating *their* net income. (R. 4a-6a.)

(Continued on next page)

(c) The contention (Pet. 8-9, 15) that the Government gave no effect to petitioner's cash on hand as shown in revenue agents' reports seems to overlook the fact that this would have harmed petitioner rather than helped him. The reports in question described physical inventories of petitioner's cash in safe deposit boxes, taken by the agents in petitioner's presence, which disclosed a total of $30,450 as of August 19, 1949, and $36,550 as of January 3, 1952. (R. 407a, 413a-414a.) This evidence, if it showed anything, tended to show that petitioner had on hand at the end of the last prosecution year (1950) substantially more cash than the $3,000 with which he was charged in the Government's computations, and hence that his 1950 unreported income was much greater than that alleged. (R. 417a.)

3. The argument that the Government did not properly account for petitioner's capital in the numbers partnership (Pet. 17-21) overlaps the argument (discussed *supra*, pp. 7-8) relating to the partnership bankroll, and has already been partly answered. Petitioner urges further that the Government unjustifiably assumed that he had drawn out each year the exact amount of his distributive share of partnership profits, and thus shifted the burden of proof to him.

It is true that the Government could not show the precise amount of petitioner's interest in the partner-

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([4] Continued)

It should be noted that the Treasury agents made an extensive investigation in various cities to determine whether petitioner or his wife had received unreported income from the sale of birds. They discovered the purchasers of only one or two birds, and those persons said they could not remember how much they had paid for them. (R. 351a-352a.)

ship bankroll.[5] This was a matter "peculiarly within the knowledge of the defendant" (*Holland* v. *United States,* 348 U.S. at 138) for, as we have shown (*supra,* pp. 5-6, 7), petitioner produced no books or records showing the amount of the partnership bankroll, nor did he even attempt orally to estimate the amount. The important consideration is that in no event—in the light of the Government's solid evidence of petitioner's cash on hand at the end of 1947, two months before the partnership was formed (*supra,* pp. 4, 5)—could the fluctuations in the partnership bankroll have reduced the alleged unreported income to a substantial degree. Petitioner's description of his estimated cash on hand at the various dates as being in the "Safety Box & Office" (R. 415a), together with his signed assurance that the statement "sets forth to our best knowledge and belief our Net Worth" (*id.*) plainly warrants the inference that the figures included his share of the partnership bankroll. Nor did the Government's computations assume that petitioner had withdrawn each year the precise amount of his distributive share. Profits not withdrawn would still be an asset to petitioner, and, having been derived from a taxable source, properly includible in his net worth.

4. Petitioner's final argument (Pet. 21-27), that the trial judge committed prejudicial errors in instructing the jury, turns on the contention that none of the following defense theories was submitted to the jury:

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[5] This is the only item of partnership net worth that appears to be in dispute. The Government's computations reflected petitioner's share of the cost of the depreciable partnership assets (automobiles and office equipment) and the liabilities. (R. 418a-419a.) A Treasury agent testified in detail as to the manner in which he had arrived at these figures. (R. 226a-227a, 241a-243a, 260a, 272a, 273a.)

(a) that the expenditures of petitioner's wife cannot be charged to him absent proof that the funds came from him; (b) that the alleged unreported income might have derived from withdrawals of capital from the partnership venture; and (c) that petitioner had done all that he could reasonably do to assure that his tax return was correct as filed.

(a) As we have pointed out, the returns involved here were joint returns. The reconstruction of income included the net worth and expenditures of both petitioner and his wife, just as the net worth statement submitted by petitioner (R. 415a) included the assets of both. The basis of petitioner's requested instruction on this score (R. 370a, Pet. 22) appears to be the allegation (*supra,* p. 6) that his wife may have received, unknown to him, unreported income from the sale of birds, and that such income may have accounted for some of her expenditures. We submit that the charge given (R. 395a, Pet. 22) adequately covers the point.

(b) The requested instruction that "Included in such non-taxable items are . . . advances of capital, including excessive drawing from any partnership and exchanges" was plainly confusing and hence properly rejected. Moreover, there was no evidentiary basis for such a specific charge. The point was well covered by the court's definition of income (R. 391a), the necessity for a solid net worth starting point (R. 393a-394a), and the duty of the Government "to investigate and track down all relevant leads whether furnished by the taxpayer or learned from other sources" (R. 392a-393a).

(c) The court was not required to define wilfulness in the precise terms suggested by petitioner (R. 371a, Pet. 23) but was free to devise its own language so long as it clearly instructed the jury, as it did, as to the essential elements of the offense (R. 391a-399a).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE 1957—414041/P.O. 759

FILED
JAN 28 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 649

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v.

UNITED STATES OF AMERICA.

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